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No. 410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TRAILWAYS OF NEW ENGLAND, INC., *Petitioner,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Trailways of New England, Inc., by its counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on April 13, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a-7a) is reported at 343 F. 2d 815. The opinion of the United States District Court for Massachusetts (R. 55-59)[1] is reported at 232 F. Supp. 608.

JURISDICTION

The judgment of the court below was entered on April 13, 1965 (Appendix B, *infra*, p. 8a). On June 29, 1965, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari herein to and including August 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in view of the employee loss of status provisions of Section 8(d) of the National Labor Relations Act, an employer is required, pursuant to a collective bargaining agreement, to arbitrate the discharges of employees who engaged in an unprotected strike during the sixty-day period proscribed by Section 8(d)?

2. Whether an employer is required to arbitrate discharges resulting from a strike where there has been a repudiation by the union and employees of a grievance and arbitration clause, and a fundamental change has occurred in the relationship of the parties prior to the demand for arbitration, as distinguished from *Drake Bakeries, Inc.* v. *Bakery Workers*, 370 U.S. 254 (1962), and *Packinghouse Workers* v. *Needham*, 376 U.S. 247 (1964)?

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[1] "R." references are to the Petitioner's appendix filed in the court of appeals.

STATUTES INVOLVED

Section 8(d) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158 (d)), provides as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and concili-

ate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) of this Act, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Section 301(a) of the Labor Management Relations Act, as amended (81 Stat. 156, 29 U.S.C. 185 (a)), provides as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor or-

ganizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

1. Background to the Proceeding

The Petitioner (Company) is engaged in the interstate transportation of passengers by motor bus between various points in Massachusetts, New York, Connecticut, New Hampshire and Maine. A collective bargaining agreement existed between the Company and the Union effective by its terms from April 23, 1961 to February 4, 1964. Article XXI of the agreement provided that—

> Section 7. All grievances arising hereunder, including discharge, disciplinary action over the interpretation and application of the Agreement shall be disposed of in the following manner: . . .

Grievance procedures were set forth in subsection a, b and c, and subsection d provided for arbitration in the event of failure to resolve the dispute under grievance procedures. Arbitration of Company grievances was provided for in Section 8 (R. 14-16).

On November 21, 1963, the Union notified the Company that it desired to make certain changes in the collective bargaining agreement which was to expire on February 4, 1964, and to resolve all grievances. The Company responded on November 27, 1964, advising the Union of its desire to cancel the agreement in its entirety and of its hope to prepare a new agreement. By letter dated December 10, 1963, the Union advised the Company of a "controversy" regarding the carry-

ing of "standees" on Company buses. This matter was put aside to be discussed at a meeting in January 1964 which had been set to resolve all outstanding grievances and to allow the Union to present its proposed changes to the agreement (*infra*, pp. 3a, 4a).[2]

On December 29, 1963, an employee-driver of the Company refused to obey a Company order to carry "standees". For this refusal, he was removed from service and, on December 31, 1963, was given a 30-day suspension for insubordination. Despite the agreement to negotiate a new contract and to resolve all disputes and grievances, all other drivers represented by the Union refused to pull their runs (*infra*, p. 2a).

A strike took place in spite of repeated warnings by the Company that it considered the strike illegal and that all participating employees were subject to discharge. The Company had demanded that the Union follow the grievance procedures outlined in the collective bargaining agreement with regard to the suspension of the driver, and had itself made five separate offers to submit this suspension to the grievance procedures (R. 25, 27, 29, 30, 32, 37). When the Union and employees refused to follow the grievance procedures required under the agreement, the Company discharged approximately 190 drivers and terminal employees for participating in the strike. These discharges were later confirmed by letters dated January 6 and January 8, 1964, and on January 14 the Company notified the Union that it was terminating and rescinding the collective-bargaining agreement as of December 31, 1963 because of the strike (*infra*, pp. 2a, 3a, R. 23).

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[2] The court below noted that these circumstances brought into issue the provisions of Section 8(d). (*infra*, p. 3a).

On January 14, 1964, the Union filed a grievance on behalf of the employees discharged. The Company refused to process these grievances because of the impropriety of the strike (*infra*, p. 3a).

2. The Decision of the District Court

The Union brought this action pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185 (*supra*, pp. 4-5) to compel arbitration under the collective bargaining agreement. The Company filed a motion to dismiss, and the Union moved for summary judgment (R. 55, 56). The district court allowed the Union's motion for summary judgment, denied the Company's motion to dismiss, and ordered the Company to submit to arbitration the grievance filed on behalf of the discharged employees[3] (R. 56, 59, 60).

Though recognizing that Section 8(d) of the National Labor Relations Act (29 U.S.C. 158(d)) prohibits a strike or lockout by a party which has given the required sixty-day notice of its intention to seek modification of an existing collective bargaining agreement during the sixty-day period—and noting further that the "Union had, in this case, given the 60-day notice about 41 days before the strike" (R. 58, fn.)—the court did not reach the "loss of status" issue. The district court found that the jurisdiction of the National Labor Relations Board to deal with "an unfair labor practice" which violates a collective bargain is

[3] The district court also ordered arbitration of the grievance of the driver whom the Company had suspended for insubordination, which is not at issue here. It should be noted that the Company raised arguments before the district court and the court of appeals which are not pursued herein.

not exclusive, and that jurisdiction also lies in the court in suits under Section 301[4] (R. 59).

Relying on the decisions in *Drake Bakeries, Inc.* v. *Bakery Workers,* 370 U.S. 254 (1962), and *Packinghouse Workers* v. *Needham,* 376 U.S. 247 (1964), the court held that the Company was required to arbitrate the discharges arising out of the strike (R. 59).

3. The Decision of the Court of Appeals

The court of appeals was unanimous in affirming the judgment of the district court. In so holding, the court reframed the Section 8(d) issue, as follows: "Does a strike arguably in violation of Section 8(d) of the National Labor Relations Act relieve the employer of his duty to arbitrate discharges resulting from the strike?" The court stated that the question was one of arbitrability "since we have some doubt—though we need not decide—whether the discharges occasioned by a violation of section 8(d) and, therefore, cloaked in the protection afforded by that section must be arbitrated." The court noted that the issue had not been raised before. Equating "loss of status" provisions affecting employees with "unfair labor practices" by a union, and relying on this Court's preference for compelling parties to go to arbitration (*Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960)), the court below held that "an employer must arbitrate grievances arising from the discharge of strikers even where the strike may have been an unfair labor practice in violation of section 8(d)." The court below declined to decide whether its decision would be the

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[4] In a footnote (R. 59), the court stated that it was "not at all clear that the strike did constitute an unfair labor practice", citing *Local Union No. 9735* v. *N.L.R.B.,* 258 F.2d 146 (C.A.D.C. 1958).

same "where a strike was admittedly or clearly a violation of 8(d)." (*infra*, pp. 5a-7a).

In a concurring opinion, Chief Judge Aldrich stated "that we are not presently deciding whether, if the strike was an unfair labor practice, it would be contrary to the provisions of the Act to foreclose by contract an employer's right to take the action contemplated by section 8(d)(4)." (*infra*, p. 7a).

The court of appeals also rejected the Company's argument that the strike in violation of an implied no-strike clause in the agreement enabled it to terminate the contract, citing *Packinghouse Workers* v. *Needham, supra,* and also *Drake Bakeries* v. *Bakery Workers, supra.* Noting that in *Needham* there was an express no-strike clause and that here, as in *Needham,* the Company contended that it considered the collective bargaining agreement "repudiated and terminated", the court below held that the Company was not relieved of its duty to arbitrate by reason of the Union's failure to comply with the grievance and arbitration provisions since "no exception was made in the arbitration provision for the arbitrability of discharges arising out of strikers." (*infra* p. 5a).

REASONS FOR GRANTING THE WRIT

1. The interpretation of the "loss of status" provision in Section 8(d) is an important issue of federal law which has not been, but should be, settled by this Court. Though it failed to meet this issue directly, the court below correctly stated that "[I]t has not been raised before." (*infra,* p. 6a).

The court below concluded that an employer *must* submit to arbitration discharges arising out of a strike which was within the sixty-day period proscribed by

Section 8(d) where the strike "may have been an unfair labor practice . . .," but declined to state what its ruling would be where "a strike was admittedly or clearly a violation of 8(d)." (*infra*, p. 7a). The statute, however, does not limit the effect of the "loss of status" provision to strikes which are unfair labor practices, but states that "(A)ny employee who engages in a strike within the sixty-day period . . . shall lose his status. . . ." Though this Court has stated that Section 8(d) "is susceptible of various interpretations" (*National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957)), such interpretations must conform to the dual purpose of the statute—to protect the right of employees to engage in concerted activities and to substitute collective bargaining for economic warfare so as to avoid interrupting the flow of commerce. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270 (1956).

The strike herein was unprotected, in that it was not a protected concerted activity, such as a strike to protest an unfair labor practice by an employer. *Mastro Plastics Corp.* v. *National Labor Relations Board, supra.* Thus, the strikers resorted to economic warfare against the Company without regard to the grievances and arbitration provisions in the existing contract (R. 14-16) or the prohibition in Section 8(d).

The statutory reference to "the duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4)" of Section 8(d) reflects a Congressional purpose to place certain responsibilities upon each. An employer is required to abstain from a lockout during the sixty-day period, and to maintain the conditions of the existing contract. The labor organization is similarly under a duty to observe the conditions of the existing contract during the sixty-

day period, without resorting to a strike. The employees are required to refrain from striking during this same period, and a breach on their part will entail a loss of their employee status. To so interpret this section as to limit the "loss of status" provisions to those cases where the strike itself was an unfair labor practice by the union would deprive the provision of any specific effect or significance. Where a strike by a union is prohibited by Section 8(d), and is therefore an unfair labor practice, the participants in it become subject to a lawful power of discharge in the employer without resort to the "loss of status" provision. *United Furniture Workers of America* v. *National Labor Relations Board,* 336 F.2d 738 (D.C.Cir. 1964), *cert. den'd.* 85 S.Ct. 73; *United Electrical Workers* v. *National Labor Relations Board,* 223 F.2d 338 (D.C. Cir. 1955), *cert. den'd.* 350 U.S. 981 (1956).

Clearly, the Congress sought a cooling off period during which *all* of the parties would be restrained in their actions so as to permit orderly collective bargaining, and the "loss of status" provision was intended to inhibit the employees from engaging in wildcat strikes or work stoppages which were not necessarily promulgated by the labor organization. Similarly, an unprotected strike, during the proscribed sixty-day period, which was not ostensibly an attempt to modify the existing agreement—whether or not promulgated by the labor organization—would necessarily bring into play the "loss of status" provision against the strikers or the cooling off period desired by the Congress could be evaded, i.e. the employees could bring economic pressure to bear on an employer in seeking to modify an existing contract by declaring their strike to be for another purpose. *Cf. Local Union No. 9735* v. *National Labor Relations Board,* 258 F.2d 146 (D.C. Cir. 1958).

Basic statutory construction requires that significance and effect be accorded to every word, for as early as in Bacon's Abridgement section 2, it was stated that "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." *Washington Market Co.* v. *Hoffman,* 101 U.S. 113, 116 (1879). The "loss of status" provision would be superfluous were it to be tied to a situation where the strike by the Union was a violation of Section 8(d), yet the court of appeals has so interpreted this section.

Moreover, the interpretation of this section by the court below would appear to be in conflict with decisions by other courts of appeals. In *Local No. 3* v. *National Labor Relations Board,* 210 F.2d 325, 333 (8th Cir. 1954), *cert. den'd.* 348 U.S. 822 (1955), the court, in referring to Section 8(d), stated:

> We are of the view that by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the company and hence they were not entitled to re-employment as a matter of right.

And, in *United Electrical Workers* v. *National Labor Relations Board,* 223 F.2d 338, 342 (D.C. Cir. 1955), *cert. den'd.* 350 U.S. 981 (1956), the court stated:

> . . . Moreover Section 8(d) of the Act specifically provides that "any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee". This strike was within the sixty-day period, and so the participants immediately thereupon lost their status as employees.

The clear language of the statute supports the interpretation adopted by these courts. The fact that the

employees engaged in an unprotected strike 41 days after the Union gave the Company the sixty-day notice required by Section 8(d) deprived them of their status as employees (*infra*, p. 3a, R. 58, fn.). *Fort Smith Chair Company*, 143 N.L.R.B. 514 (1963).[5] The court of appeals, citing *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959), declined to decide whether the strike by the Union was an unfair labor practice in violation of Section 8(d),[6] but the absence of such a determination cannot be relied upon as a means to evade a determination herein as to the affect of the "loss of status" provision on employees participating in the strike during the proscribed period.

The fact that this Court "has made clear its preference for compelling parties to go to arbitration when they have agreed to do so" (*infra*, p. 6a) does not diminish the effect of Section 8(d), for ". . . [A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). There is assuredly no language in the collective bargaining agreement which would indicate any intention by the Company to waive such rights or

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[5] On appeal, the court did not find it necessary to pass on this point in affirming the decision of the Board. *United Furniture Workers of America* v. *National Labor Relations Board*, 336 F.2d at 740, fn. 3.

[6] The Union provided the sixty-day notice and offered to meet for negotiations, but there is no record of a notification to the Federal Mediation and Conciliation Service, or the corresponding Massachusetts agency, as required by Section 8(d)(3). *See, United Furniture Workers of America* v. *National Labor Relations Board, supra*, and *Local Union 219* v. *National Labor Relations Board*, 265 F.2d 814 (D.C. Cir. 1959), where the court specifically reserved the issue of "loss of status". 265 F.2d at 819, fn. 3.

authority as it might accrue by action of Section 8(d). It is clear that the public interest would not be served if the parties to a labor agreement could by contract effect a waiver of Section 8(d), wherein the Congress sought to establish a cooling off period so as to maintain labor peace.[7] Suffice it to say that the court below failed to give effect to the "loss of status" provision of Section 8(d) by requiring the Company to arbitrate the discharges arising from the strike within the proscribed period. This decision now constitutes a precedent which endangers national labor relations and continued labor peace by its restrictive interpretation of Section 8(d), contrary to the Congressional intent and purpose.

2. In requiring the Company to arbitrate the discharges of employees who had repudiated the grievance and arbitration provisions of the collective bargaining agreement, and thereafter engaged in a strike in violation of an implied no-strike clause in the agreement, the court below has departed from this Court's decisions in *Drake Bakeries* v. *Bakery Workers, supra,* and *Packinghouse Workers* v. *Needham, supra.* The decision below is in conflict with the qualifying language set forth by this Court in *Drake Bakeries* and *Needham,* and, if allowed to stand, would place in jeopardy the future employment of arbitration clauses in collective bargaining agreements.

Drake Bakeries involved an action for damages by an employer against a union pursuant to Section 301

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[7] Concurring opinion of Chief Judge Aldrich, *infra* p. 7a. *See, Lodge 743, Int. Ass'n of Mach.* v. *United Aircraft Corp.,* 337 F.2d 5 (2nd Cir. 1964), *cert. den'd.* 380 U.S. 908; *International U. of E.R. & M. Wkrs., Local 613* v. *N.L.R.B.,* 328 F.2d 723 (3rd Cir. 1964); *J. I. Case* v. *N.L.R.B.,* 321 U.S. 332 (1944).

of the Labor Management Relations Act. The employer, which had not sought or attempted to terminate or rescind the existing collective bargaining agreement, which included a no-strike clause, alleged that the union had engaged in a one-day strike which was a major breach of the agreement relieving the employer from a need to arbitrate its damage claim—as was otherwise required by the agreement. The union claimed that it did not strike, and that the employer was required to submit its complaint to arbitration pursuant to the terms of the agreement.

Noting that the question of a strike was in dispute and that only four months previously the employer had submitted to arbitration a claim for damages arising out of an earlier alleged strike, this Court affirmed the decisions of the lower courts in finding that the employer's claim for damages was properly the subject of arbitration, since an alleged strike in violation of a no-strike clause in a contract is not automatically and regardless of the circumstances such a breach or repudiation of the arbitration clause as to excuse the employer from arbitrating. In so holding, this Court stated:

> . . . Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach; and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important. 370 U.S. at 262.

The facts in *Drake Bakeries* did not demonstrate such a breach or repudiation.

In *Needham*, a union had brought an action pursuant to Section 301 to compel an employer to arbi-

trate discharges arising out of an alleged strike in violation of a no-strike clause in a collective bargaining agreement. The employer claimed that the no-strike clause was so basic to the collective bargain that its breach by the union was so completely inconsistent with the arbitration clause as to excuse the employer's duty to arbitrate. This Court, citing its opinion in *Drake Bakeries*,[8] held that the employer was required to arbitrate the discharges, and noted that the duty to arbitrate was clearer in this case than in *Drake Bakeries* because the "claim of wrongful discharge is one which Needham agreed to arbitrate." 376 U.S. at 252.

In *Needham*, as in *Drake Bakeries*, this Court did not state that an arbitration clause would survive a strike in breach of a contract under all circumstances and in every situation.

> . . . Whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate we need not decide, since the undeveloped record before us reveals no such circumstance. 376 U.S. at 253.

In the instant proceeding, the undisputed facts of record are that the Company made five separate offers to submit the suspension of the driver (Paine) to the grievance procedures under the collective bargaining agreement (R. 25, 27, 29, 30, 32, 37). The Company notified its employees that the Union was refusing to comply with the grievance and arbitration section of the agreement, and that the strike was illegal and unauthorized, by distributing mimeographed notices, by

[8] And quoting the section set forth above.

telephone and telegraph, by press and radio releases and by direct face-to-face exchanges (R. 25, 27, 29, 30, 32-33, 37, 57). The Union repudiated the grievance and arbitration procedures by embarking upon and continuing the unauthorized strike. The courts below failed to take this into consideration, though the Union did not rebut or refute the fact that such offers were made by the Company, prior to the strike, to submit the matter of the suspended driver—which the courts found to be the basis of the strike action (*infra*, p. 2a, R. 57)—to the grievance and arbitration procedures required by the collective bargaining agreement.[9]

The Union having repudiated its promise to submit its dispute to the grievance and arbitration procedures set forth in the contract, the case is clearly distinguishable from and within the exception outlined in *Drake Bakeries*. 370 U.S. at 262. Moreover, the record here demonstrates "a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration," as premised in *Needham*. 370 U.S. at 253. The strike occurred within the sixty-day period proscribed by Section 8(d), and the participating employees lost their status as employees of the Company (*supra*, pp. 9-14).

The court below has erroneously interpreted *Drake Bakeries* and *Needham* as demanding arbitration of

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[9] The court of appeals stated that the contract here lacked the no-strike clause contained in *Needham* (*infra*, p. 5a), though the record demonstrates that the grievance and arbitration provisions in the contract were intended to prevent strikes by providing a peaceful means of settling disputes (R. 44, 45-46, 47, 49), and thus constituted an implied no-strike clause. *Local 174, Teamsters* v. *Lucas Flour*, 369 U.S. 95 (1962); *International Brotherhood* v. *W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir. 1956), *app.* dism'd, 352 U.S. 802 (1956).

discharges arising out of a strike in violation of an actual or implied no-strike clause, contrary to the clear language of these decisions.

> . . . We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged . . . 370 U.S. at 265.

In no other case known to the Petitioner has a court of appeals given a like interpretation to this Court's decisions in *Drake Bakeries* and *Needham*.[10] If the court below is correct in its interpretation and application of these decisions, parties to collective bargaining agreements may well come to shun arbitration clauses, in that they may be ignored and repudiated by one party without sacrificing thereby its rights thereafter to resort to arbitration. This would be detrimental to this Court's purposes in giving preference to enforcement of arbitration clauses as a means of insuring labor peace.

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[10] *Kennecott Copper Corp.* v. *International Bro. of Elec. Workers*, 339 F.2d 343, 345 (10th Cir. 1964); *Brotherhood of L. F. & E.* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964); *Minnesota Joint Bd.* v. *United Garment Mfg. Co.*, 338 F.2d 195, 199 (8th Cir. 1964); *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 150 (5th Cir. 1964), *cert. den'd.* 379 U.S. 991; *International U. of Elec. R. & M. Wkrs.* v. *General Elec. Co.*, 332 F.2d 485, 492 (2nd Cir. 1964), *cert. den'd.* 379 U.S. 928; *Bonnot* v. *Congress of Independent Unions Local #14*, 331 F.2d 335, 358 (8th Cir. 1964); *E. T. Simonds* v. *Int'l. Hod Carriers*, 315 F.2d 291, 293 (7th Cir. 1963); *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F.2d 217, 219 (4th Cir. 1963), *cert. den'd.* 375 U.S. 818.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6342.

TRAILWAYS OF NEW ENGLAND, INC., *Appellant,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

Betty J. Southard, with whom *Edward I. Masterman, Paul J. Redmond, Richard R. Paradise, Masterman & Redmond* and *Roberts & McInnis* were on brief, for appellant.

Earle W. Putnam, with whom *Bernard Cushman, Arthur J. Flamm,* and *Segal and Flamm* were on brief for appellee.

Opinion of the Court

April 13, 1965.

HARTIGAN, *Senior Circuit Judge* (by designation). This is an appeal from a summary judgment of the United States District Court for the District of Massachusetts entered

May 13, 1964, ordering the appellant company to arbitrate certain grievances relating to the suspension of one of its drivers and to the discharge of other employees.

The company is engaged in the interstate transportation of passengers by motor bus between various points in Maine, New Hampshire, Massachusetts, Connecticut and New York. A collective bargaining agreement existed between it and the union effective from April 23, 1961 to February 4, 1964. By Article XXI it provided for the settling of grievances as follows:

> "Section 7. All grievances arising hereunder, including discharge, disciplinary action over the interpretation and application of the Agreement shall be disposed of in the following manner: . . . ."

Sub-sections a, b, c, and d set forth the procedure for handling grievances and for arbitration in the event of failure of the grievance procedures. Section 8 provided procedures for company grievances. The contract did not contain a no-strike clause.

In the period between August and December of 1963 differences arose between the company and the union over whether the bus operators — members of the union — were required to carry standing passengers. Finally, on December 29, 1963, one of the operators, Paine, refused to obey a company order to carry standees. The company thereupon removed him from service and on December 31, 1963, suspended him for thirty days for insubordination. The union filed a grievance protesting the suspension on January 7, 1964, but it was denied by the company on its merits. In protest against Paine's suspension, all the other union drivers refused to pull their runs. After warnings that it considered the strike illegal and that all participating employees were subject to discharge, and after demands

that the union follow the grievance procedure of the contract, the company discharged approximately 190 operators and terminal employees for participating in the strike. Most of the discharges were confirmed by letter on January 6, 1964, although some of the employees were discharged on January 8. On January 14 the company notified the union that it was rescinding the contract as of December 31, 1963 because of the strike. It also refused to process grievances filed on January 14 in behalf of the discharged employees. The union then brought this action pursuant to section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, to compel arbitration.

During these same months the company and the union were preparing to open negotiations over a new collective bargaining agreement. On November 21, 1963, the union gave the company notice of its desire to make certain changes in working conditions and pay practices in the contract which was to expire February 4, 1964, and of its desire to resolve all grievances. The company responded on November 27 by giving the union notice of its desire to cancel the agreement in its entirety and of its hope to prepare a new proposed agreement. It also suggested that any outstanding grievances be settled in accordance with Article XV, Section 2, of the collective bargaining agreement, which provided that "all unsettled claims will be paid, denied or dropped before expiration date of present contract."

On December 10 the union sent a letter to the company's vice-president Powell, alluding to the difference of opinion over the carrying of standees. This letter was put aside to be discussed at a January meeting set to resolve all grievances and to allow the union to present its changes in the contract. It seems to be agreed by the parties that these circumstances brought into play the provisions of section 8(d) of the National Labor Relations Act, 29 U.S.C.

§ 158(d).[1] The union was thus obligated to continue the terms and conditions of the existing contract in full force and effect, without resorting to strike or lockout during a sixty-day period commencing November 21, 1963. The discharges sought by the union to be arbitrated arose from a strike engaged in during that period.

The company's first major contention is that it was justified in rescinding the collective bargaining agreement and

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[1] "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

". . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

is no longer under any duty to arbitrate because the strike over Paine's suspension was a material breach of the agreement, in that the strike violated the provision for arbitration, which, it contends, was an implied no-strike clause. This contention must fail in the light of *Packinghouse Workers* v. *Needham,* 376 U.S. 247 (1964). In that case the Supreme Court compelled arbitration where the union struck in violation of an express no-strike clause. There, too, the company announced that it considered the collective bargaining agreement "repudiated and terminated" and that it would not have further dealings with the union. The company here has produced evidence to show that the parties considered the arbitration provision to be an implied no-strike clause and that it truly was the "quid pro quo" of the arbitration agreement. We do not see how that can alter the result in view of the Supreme Court's clear rejection of the same argument in *Needham,* 376 U.S. at 251. Here, as in *Needham,* no exception was made in the arbitration provision for the arbitrability of discharges arising out of strikes. In addition to that the contract here lacked the no-strike clause contained in the *Needham* agreement. See also *Drake Bakeries* v. *Bakery Workers,* 370 U.S. 254 (1962).

The company further contends that the strike in protest of Paine's suspension was a violation of section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), that the strikers thereby lost their status as employees, and that there is, therefore, no duty to arbitrate their discharge. In support of this contention the company attempts to tie in the differences over the carrying of standees with the proposed negotiations for a new agreement. It then argues that the strike protesting Paine's suspension was a strike to terminate or modify the existing contract, violative of section 8(d). See *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270 (1956). It is by no means clear from the affidavits presented by the parties that the question of standees was so related to negotiations for a new contract.

In view of our resolution of the issue, however, that matter is of no importance.

The question whether a given set of facts constitutes an unfair labor practice under section 8 is in the first instance for the National Labor Relations Board to decide. *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959). We, therefore, decline to decide whether the strike here was an unfair labor practice, in violation of section 8(d). We do admit, however, that it arguably was in violation of 8(d). On the other hand, we recognize that not every strike during the 8(d) sixty-day period is prohibited by that section. *Mastro Plastics* v. *Labor Board, supra* (unfair labor practice strike held permissible). See also *Local Union No. 9735, Etc.* v. *National Labor Rel. Bd.*, 258 F.2d 146 (D.C. Cir. 1958). The question, therefore, poses itself: Does a strike arguably in violation of section 8(d) of the National Labor Relations Act relieve the employer of his duty to arbitrate discharges resulting from the strike?

This is a question which goes, in the first instance, to arbitrability, since we have some doubt—though we need not decide—whether discharges occasioned by a violation of section 8(d) and, therefore, cloaked in the protection afforded by that section must be arbitrated. The question thus may be answered by the court. See *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). Cf. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). It has not been raised before. The Supreme Court, however, has made clear its preference for compelling parties to go to arbitration when they have agreed to do so. See, e.g., *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960). We do not believe it would be in keeping with the preferred position attached by the Court to labor arbitration were we to allow an employer to escape its duty to arbitrate whenever it can work out a theory that a particular strike may have been an unfair labor practice. We, therefore, hold that an employer must arbitrate grievances arising from the discharge of strikers even where the strike may

have been an unfair labor practice in violation of section 8(d). We decline to decide whether the same result would obtain where a strike was admittedly or clearly a violation of 8(d).

The company's contention that the union failed to file the grievances relating to discharge of the employees within the requisite time limits, is without merit. It can raise that defense before the arbitrator but not before this court. *John Wiley & Sons* v. *Livingston, supra.*

Nor are we impressed with the company's argument that the district court could not correctly have based its decision, *inter alia,* on an affidavit not given on personal knowledge. To the extent that the affidavit went beyond business records presented with it, it is not relied on by us in affirming the trial court. We do not understand the company as arguing that the business records themselves were inadmissible.

It follows that the sole question for the trial court to decide was whether the parties agreed to arbitrate discharges and disciplinary action. By the express words of their agreement they did, and the district court, therefore, was correct in ordering the company to arbitrate.

Judgment will be entered affirming the judgment of the district court.

ALDRICH, *Chief Judge,* (concurring). I quite agree with the court's opinion, but with the understanding, of which I wish to make note, that we are not presently deciding whether, if the strike was an unfair labor practice, it would be contrary to the provisions of the Act to foreclose by contract an employer's right to take the action contemplated by section 8(d)(4). *Cf. Penello* v. *International Union, U.M.W.,* D.C.D.C., 1950, 88 F. Supp. 935, 941; see *Local 453, International Union of Elec. Workers* v. *Otis Elevator Co.,* 2 Cir., 1963, 314 F.2d 25, *cert. den.* 373 U.S. 949. I note, also, that a determination by the arbitrator, as a prelude to granting relief under the contract, that the strike was not an unlawful labor practice would not be final. See *Carey* v. *Westinghouse Corp.,* 1964, 375 U.S. 261, 272.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6342.

TRAILWAYS OF NEW ENGLAND, INC., *Defendant, Appellant,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO DIVISION 1318, *Plaintiff, Appellee.*

Judgment

April 13, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

Approved,

Aldrich, *Ch. J.*

By the Court:

ROGER A. STINCHFIELD
Clerk.